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No. [redacted] 117

In the Supreme Court of the United States

OCTOBER TERM, 1962

SPENCER M. ANDERSON, ET AL., AND ARTHUR MORGAN, ET AL., PETITIONERS

v.

PANAMA CANAL COMPANY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit (Pet. 13-20)[1] is reported at 312 F. 2d 98. The opinion of the United States District Court for the District of the Canal Zone (R. 36-60)[2] is reported at 191 F. Supp. 765.

[1] "Pet." refers to the petition for certiorari in this case.

[2] "R." refers to the record as printed for the use of the court below which has been filed by the petitioners.

JURISDICTION

The judgment of the Court of Appeals was entered on January 9, 1963 (Pet. 21). Petition for rehearing *en banc* was denied by the Court of Appeals on February 11, 1963 (Pet. 22). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether petitioners, employed as officers, operators, or members of crews of vessels of the Panama Canal Company, a corporate agency of the United States, are entitled to wage practices accorded to "wage-board" employees under the provisions of Section 23 of the Act of March 28, 1934, 48 Stat. 522, 5 U.S.C. § 673c, notwithstanding Section 606 of the Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, 5 U.S.C. § 946, which provides that "vessel employees of the Panama Canal Company may be compensated in accordance with the wage practices of the maritime industry."

2. Whether petitioners are entitled to compensation for time spent in traveling, aboard respondent's water-borne conveyances, to and from the vessels of respondent upon which they are employed, based upon their contention that such travel time represents "hours of labor" within the meaning of Section 23 of the Act of March 28, 1934, 48 Stat. 522, 5 U.S.C. § 673c, even though petitioners' counterparts in the private maritime industry are not compensated for such travel time.

3. Whether petitioners have a statutory right to the travel time sought by them under Section 248 of Title 2, Canal Zone Code (1934), which simply, in effect, authorizes the respondent to appoint its employees, define their authority and duties, and fix their compensation.

4. Whether petitioners are entitled to assert a right under Section 248 of Title 2, Canal Zone Code (1934), having failed to raise the question upon appeal to the court below.

5. Whether the decision is sustainable on other grounds urged by respondent in the court below.

STATUTES INVOLVED

1. The pertinent provisions of Section 23 of the Act of March 28, 1934 (commonly known as the Thomas Amendment), 48 Stat. 522, 5 U.S.C. § 673c, are as follows:

> The weekly compensation, minus any general percentage reduction which may be prescribed by Act of Congress, for the several trades and occupations, which is set by wage boards or other wage-fixing authorities, shall be reestablished and maintained at rates not lower than necessary to restore the full weekly earnings of such employees in accordance with the full-time weekly earnings under the respective wage schedules in effect on June 1, 1932: *Provided*, That the regular hours of labor shall not be more than forty per week, and all overtime shall be compensated for at the rate of not less than time and one half.[2]

2. The pertinent provisions of the Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, 5 U.S.C. § 901-48, are as follows:

COVERAGE

> SEC. 101. (a) [5 U.S.C. § 901]. Subject to the exemptions specified in section 102 of this Act, titles II, III, and IV of this Act shall apply (1) to all civilian officers and employees in or under the executive branch of the Government, including Government-owned or controlled corporations, and in or under the District of Columbia municipal government, . . .

[2] This paragraph of Section 23 is set out as the law read when the case was decided by the District Court on April 21, 1961. Its subsequent amendment by Act of August 31, 1962, § 201, 76 Stat. 360, is not material to any of the issues before this Court.

EXEMPTIONS

SEC. 102. [5 U.S.C. § 902] * * *

(b) This Act, except section 607, shall not apply to . . . (2) employees outside the continental limits of the United States, including those in Alaska, who are paid in accordance with local native prevailing wage rates for the area in which employed. . . .

(c) This Act, except sections 205 and 607, shall not apply to employees whose basic compensation is fixed and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose.

(d) This Act, except sections 606 and 607, shall not apply to employees of the Transportation Corps of the Army of the United States on vessels operated by the United States, to vessel employees of the Coast and Geodetic Survey, to vessel employees of the Department of the Interior, or to vessel employees of the Panama Canal Company.

* * * * *

WAGE BOARD EMPLOYEES

SEC. 205. [formerly Sec. 203, 5 U.S.C. § 913] Employees whose basic rate of compensation is fixed on an annual or monthly basis and adjusted from time to time in accordance with prevailing rates by wage boards or similar administrative authority serving the same purpose shall be entitled to overtime pay in accordance with the provisions of section 23 of the Act of March 28, 1934 (U.S.C., 1940 edition, title 5, sec. 673c). . . .

* * * * *

VESSEL EMPLOYEES

SEC. 606. [5 U.S.C. § 946] Employees of the Transportation Corps of the Army of the United States on vessels operated by the United States, vessel

employees of the Coast and Geodetic Survey, vessel employees of the Department of the Interior and vessel employees of the Panama Canal Company, may be compensated in accordance with the wage practices of the maritime industry.

3. The pertinent provisions of the Canal Zone Code, approved June 19, 1934,[4] 48 Stat. 1122, as amended, are as follows:

TITLE 2

Section 248. [As added by Act June 29, 1948, c. 707, sec. 2, 62 Stat. 1076, and amended September 26, 1950, c. 1049, sec. 8, 64 Stat. 1041.]

GENERAL POWERS OF CORPORATION.—The corporation shall have and may exercise the following general powers, in addition to those elsewhere conferred in this article:

* * * * * *

(e) May appoint such officers, agents, attorneys, and employees as may be necessary for the conduct of the business of the corporation, define their authority and duties, fix their compensation, delegate to them such of the powers of the corporation as may be necessary, require that such of them as it may designate be bonded, and fix the penalties and pay the premiums of such bonds. . . . The provisions of section 82 of this title, as amended, shall apply to the corporation and to its officers and employees.

* * * * * *

Section 249. [As added by Act of June 29, 1948, c. 706, sec. 2, 62 Stat. 1076, and amended Septem-

[4] The 1934 Canal Zone Code was repealed and a new Code enacted by Public Law 87-845, approved October 18, 1962, 76A Stat. 1. Sections 248 and 249 of Title 2, set out here, appear in the 1962 Code as Sections 121 and 66, respectively, of Title 2, 76A Stat. 15, 11.

ber 26, 1950, secs. 2(b), 9, 64 Stat. 1038, 1042.]

SPECIFIC POWERS OF CORPORATION.—Subject to the provisions of the Government Corporation Control Act, the corporation shall have and may exercise the following specific powers, in addition to those elsewhere conferred in this article:

(a) May maintain and operate the Panama Canal.

* * * * *

(c) May construct or acquire vessels, and operate the same for transportation of passengers or freight and for other purposes.

(d) May construct or acquire, establish, maintain, and operate docks, wharves, piers, harbor terminal facilities, shops, yards, marine railways, salvage and towing facilities, fuel-handling facilities, motor transportation facilities, power systems, water systems, . . .

* * * * * *

4. The pertinent provisions of the Classification Act of 1949, 63 Stat. 954, as amended, 5 U.S.C. §§ 1071-153, are as follows:

SEC. 202. [5 U.S.C. § 1082] This Act (except title XII) shall not apply to—

* * * * *

(8) officers and members of crews of vessels, whose compensation shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry;

* * * * *

STATEMENT

This litigation, instituted as two civil actions which were consolidated for trial and subsequent appeal, was brought against the Panama Canal Company by the 171

petitioners who are, or have been, officers, operators and members of the crews of dredges and other vessels operated by the respondent in Canal Zone waters (R. 63-65). Respondent is a wholly-owned corporate agency and instrumentality of the United States charged with the operation and maintenance of the Panama Canal as an interoceanic waterway and with the conduct of its incidental business activities (R. 61, 62).

The jurisdiction of the District Court for the District of the Canal Zone was invoked because the question is one involving laws of the United States applicable to the Canal Zone. 7 C.Z.C. § 23g (1934); 3 C.Z.C. § 141, 76A Stat. 56 (1962).

Petitioners claim additional compensation for time spent by them, before and after regularly-scheduled work shifts, in traveling to and from their duty stations aboard dredges and other vessels of the respondent's Dredging Division. Such travel is performed by means of land and water-borne conveyances furnished and operated by respondent. The claim was advanced as a matter of statutory right under Section 23 of the Act of March 28, 1934, 48 Stat. 522, 5 U.S.C. § 673c (commonly known as the Thomas Amendment), on the theory that the travel time in question constitutes regular *hours of labor* within the meaning of that law.

It is established that petitioners are paid at hourly rates for a regular workweek of forty hours with overtime work compensated at the rate of time and one-half. Only such time as is spent on duty aboard the vessels to which th employees are assigned is treated as compensable. The time spent in traveling over water and land to and from the duty station has never been treated as work time by the respondent. The means of travel has been furnished the petitioners by the Company free of cost. (Pet. 13, 14; R. 61, 69, 70, 71, 75-76)

The District Court held that the Thomas Amendment

applies to these employees. It further held that the travel overland to and from the vessels in the Company's vehicles is *not work* but that the remainder of the trip over water constitutes *hours of labor* under the Amendment and is compensable work time.

Inasmuch as the issue of damages had not been tried, the District Court, upon motion of the Company, certified that its interlocutory order involved two controlling questions of law as to which there was substantial ground for difference of opinion. The Court of Appeals accepted the questions for review under 28 U.S.C. § 1292(b). Although the District Court invited both parties to submit all "controlling questions" of law for certification (R. 97), the employees did not elect to appeal the adverse ruling on remunerability of land travel or to submit alternative controlling questions of law that would be dispositive of petitioners' claim to compensation for travel over water.

The Court of Appeals reversed on the ground that Section 606 of the Federal Employees Pay Act of 1945, 59 Stat. 295, as amended, 5 U.S.C. § 946, which expressly authorizes the Panama Canal Company to fix the compensation of its vessel employees in accordance with the wage practices of the maritime industry, is controlling as specific legislation and takes precedence over the general terms of the Thomas Amendment, which is applicable to federal employees in a category described as "the several trades and occupations, [the compensation for] which is set by wage boards or other wage-fixing authorities." The appellate court did not find it necessary to decide whether this travel time over water is "hours of labor" as claimed. Assuming *arguendo* that it is, the court held that a repugnancy exists between the Thomas Amendment and Section 606 in view of the finding that it is not the practice in the maritime industry to compensate vessel employees for such travel to and from their

duty stations. The conflict was resolved in favor of the express authority granted to the respondent under Section 606. (Pet. 16-17)

After judgment was entered by the Court of Appeals on January 9, 1963, the employees filed petition for rehearing *en banc* in which they urged for the first time the issue of a right to travel-time compensation under Section 248 of Title 2, Canal Zone Code (1934) which right was said to be independent of claimed entitlement under the Thomas Amendment (Appellees' Petition for Rehearing, p. 2). The Court of Appeals denied the petition for rehearing on February 11, 1963 (Pet. 22).

ARGUMENT

It is respectfully submitted that review by this Court is unwarranted. There is no important federal question involved here. The decision in question applies to only a limited area of federal employment, and, as to that, makes no change in long-established wage practices. It has no relation or application to the field of private employment at all, except in the sense that it approves respondent's administrative action under Section 606 of adopting for its vessel employees the pay practices of the private maritime industry.

There is no conflict with decisions of this Court, and the particular issue has not been before any other court of appeals.

The opinion of the court below is well reasoned; it construes Section 606 and the Thomas Amendment in a manner which gives effect to the specific purpose intended by the Congress and confirms the contemporaneous administrative construction of the law that has been applied consistently by the respondent agency for more than seventeen years.

The separate claim of a statutory right to travel pay that is independent of the Thomas Amendment was not

timely asserted and, in any event, is clearly without merit.

No different result would be reached in this case, even if the rationale of the Court of Appeals were in any respect deficient, because the decision is fully sustainable on independent grounds.

1. *There is no important question of federal law.*—The narrow issue here affects 171 men who work outside the continental United States as officers, operators or members of the crew of dredges and other vessels operated by the Panama Canal Company, a federal corporation (R. 61-65). The petition states that the question deserves review because of its general impact upon the 40-hour workweek ("our national labor policy") and because large numbers of employees will be deprived of a right under the Thomas Amendment to receive compensation at the rate of time and one-half for work in excess of 40 hours per week (Pet. 4, 5). Respondent submits that on the basis of this record and existing law such results cannot reasonably be said to flow from the decision of the Court of Appeals.

In the first place, the Thomas Amendment and Section 606 apply only to personnel of the federal government and, in the case of the latter statute, to only a specified category (vessel employees) in four federal agencies, including the Panama Canal Company. Since neither law has any application to non-Government employment, the decision could not have any effect on conditions in private industry one way or the other. To the contrary, in confirming respondent's right under Section 606 to apply wage practices of the corresponding segment of the private maritime industry, the decision effectively extends the national maritime labor policy to Government employees in maritime work. This fully conforms with manifest Congressional intent.

The 40-hour workweek is not generally recognized or required by law in the maritime industry. Congressional policy in this regard is apparent from the fact that the

maximum-hours provision of the Fair Labor Standards Act of 1938 has never been made applicable to persons employed as seamen.[5] Similarly, the maritime worker when employed by a contractor or subcontractor on a public work of the United States is expressly excluded from the maximum-hour limitations of the Contract Work Hours Standards Act.[6] Since Congress has not seen fit to extend to the maritime industry the 40-hour workweek that is prescribed for many types of employment ashore, petitioners are arguing, in effect, that the decision will deprive "many employees" of a right not granted by statute. This is a matter for the Congress rather than the courts.

On the other hand, where the wage practice in a particular portion or segment of the maritime industry is to fix a 40-hour week, as is the case in the dredging industry here involved, the ruling in the case at bar will support its continued application to vessel employees who are subject to Section 606.

The petitioners predict that the ruling of the lower court will have widespread effect in limiting use of the 40-hour week. That result does not even obtain with respect to them as litigants. The record shows that they do have a regularly-scheduled, 40-hour workweek and are compensated for overtime at the rate of time and one-half (Finding 25, R. 75). This corresponds to the practice of commercial dredging companies in the maritime industry (Finding 7(f), R. 90). Thus, the decision of the lower court does not have any effect on the pre-

[5] Fair Labor Standards Act of 1938, § 13(b)(6), 52 Stat. 1067, as amended, 29 U.S.C. § 213(b)(6) (Supp. IV, 1963).

[6] "... for purposes of this Act, laborers and mechanics shall include workmen performing services in connection with dredging or rock excavation in any river or harbor of the United States or of any territory or of the District of Columbia, *but shall not* include any employee employed as a seaman." (Emphasis added.) Act of August 13, 1962, § 103(a), 76 Stat. 358.

scribed length of their workweek at all. It only means that the travel to and from their duty stations on the vessel will continue to be performed on their own time, as is also the case with their counterparts working for private employers.

There is nothing in the record of this case to show how many federal vessel employees, other than petitioners, are subject to Section 606. Indeed, it appears as a matter of law that Section 606 has little or no application to vessel employees other than those of the Panama Canal Company, for the reason that as to the other enumerated agencies Section 606 must now be read in the light of Section 202(8) of the Classification Act of 1949, 5 U.S.C. § 1082(8), which affirmatively provides that the compensation of officers and members of crews of vessels ". . . shall be fixed and adjusted from time to time as nearly as is consistent with the public interest in accordance with prevailing rates and practices in the maritime industry. . . ." 30 Comp. Gen. 158, 161-62 (1950).

Unlike the Panama Canal Company (which is excluded from the Classification Act of 1949 by Section 202(20), 5 U.S.C. § 1082(20)), the other agencies enumerated in Section 606 are not excluded from the Classification Act of 1949 and hence application of Section 606 to those agencies would appear to be superseded by the affirmative provisions of Section 202(8) of the Classification Act except to the extent that the term "vessel employees" in the former section may be somewhat more comprehensive than the term "officers or members of crews of vessels" in the latter section. Thus, for practical purposes the decision in the case at bar construing the effect of Section 606 affects only vessel employees of the Panama Canal Company.

However, even assuming *arguendo* that the decision

might theoretically affect a limited number of vessel employees of the other agencies enumerated in Section 606, respondent submits that the evident purpose of the law and the way it has here been shown to have been applied (i.e., to conform Government-agency practices for vessel employees to those followed in the private maritime industry) negate the assertion that the decision will have an adverse effect, regardless of the numerical scope of its application. In the light of that, and since it is a matter involving internal agency management in the executive branch, a field which the courts ordinarily consider immune from, or subject to only limited, judicial review, the instant case does not present an important question of federal law that would justify review on certiorari.

2. *There is no conflict with decisions of this Court.*—The petition states that the decision in the instant case is in conflict with the ruling of this Court in *United States v. Townsley*,[7] 323 U.S. 557 (1945). That contention does not survive analysis because: (a) Section 606, to which the Court of Appeals gave precedence over the Thomas Amendment, is a specific statute which was enacted at least five months after *Townsley* was decided in January 1945, and (b) the legal status of dredgemen on the Panama Canal, who then worked for the noncorporate Canal agency, changed materially on July 1, 1951 when they became vessel employees of the respondent Panama Canal Company.

In the *Townsley* case, this Court decided that the Governor of the Panama Canal acted as a wage-fixing

[7] The question of compensability of travel time was not raised in that suit although it is apparent that the same type of travel was then being performed without pay (Findings 4, 25, 3; R. 62, 75, 86). Thus, the end result (denial of pay for travel time) in the instant case would not be in conflict with the *Townsley* decision even if petitioners were otherwise subject to the Thomas Amendment.

authority within the meaning of the Thomas Amendment when he established (by reference to prevailing rates in the United States) the salaries of certain employees on floating equipment operated by the noncorporate agency known as The Panama Canal [now called Canal Zone Government]. It was held that such employees, who were paid on a monthly basis, were entitled to a 40-hour workweek and the overtime benefits of the Thomas Amendment even though theretofore only hourly and weekly employees were considered to come within its scope. The relevant points regarding the decision are that it dealt with the *noncorporate* Canal agency, rather than the respondent corporation, and that the Court did not then have before it the legislation, subsequently enacted, that prescribed special wage treatment for vessel employees in certain designated federal agencies.

In June 1945 Congress passed the Federal Employees Pay Act[8] providing a comprehensive plan of premium compensation (overtime, night differential, holiday pay, etc.) for Government workers generally. Sections 102(d) and 606 of the Act provided that no part of this statutory plan should apply to vessel employees of the Army Transportation Corps, the Coast and Geodetic Survey, and the Panama Railroad Company [respondent's earlier corporate name]. As to those employees, the Act authorized them "to be compensated in accordance with the wage practices of the maritime industry."

In 1946 Sections 102(d) and 606 were amended[9] to place vessel employees of the Department of the Interior on the same footing with those of the Army Transportation Corps, the Coast and Geodetic Survey and the Panama Railroad Company.

The legislative history of the 1945 Pay Act and the

[8]Act of June 30, 1945, 59 Stat. 295, 5 U.S.C. §§ 901-48.
[9]Act of May 24, 1946, § 8, 60 Stat. 218.

1946 amendment to Sections 102(d) and 606 thereof clearly shows that it was the intention of Congress that this special class of employees in the four agencies should be subject to a policy whereby the wages and pay practices of the maritime industry would be used as a basis for fixing their compensation.[10] The same history also shows that, in enacting the 1945 Pay Act, the Congress was not only aware of the *Townsley* decision of this Court, but wished to affirmatively enact the judicial construction of the Thomas Amendment that it contained.[11] Section 203 [later designated 205] of the Act provided that wage-board employees whose basic compensation was fixed on an annual or monthly basis and adjusted in accordance with prevailing rates would be entitled to receive overtime in accordance with the Thomas Amendment. The exclusion of vessel employees, by Sections 102(d) and 606, from a statutory scheme of premium compensation which included the enactment of the *Townsley* rule, is clear indication that Congress considered vessel employees as a group distinct from wage-board employees and one to which the wage practices of the private maritime industry, as distinguished from the Government practices then being prescribed, should apply.

Petitioners' reliance on a "savings clause" appearing in the 1958 statute[12] which established a merit and wage system for the Canal Zone, is misplaced. That clause merely preserved the applicability of the Thomas Amendment for those employees within its coverage and had no positive effect toward extension of the 1934 Act.

The record shows that on July 1, 1951, pursuant to

[10] H.R. Rep. No. 726, 79th Cong., 1st Sess. 10, 21 (1945); H.R. Rep. No. 1834, 79th Cong., 2d Sess. 21 (1946).

[11] The portion of House Report No. 726 dealing with the *Townsley* rule and Section 203 of the Act is set out in the District Court's opinion in the instant case (R. 46-47).

[12] Act of July 25, 1958, § 47, 72 Stat. 411 (subsequently codified as 2 C.Z.C. § 156, 76A Stat. 20 (1962).

2 C.Z.C. § 256 (1934) (as added by Act of September 26, 1950, § 10, 64 Stat. 1042) and Executive Order 10263[11] of June 29, 1951, issued thereunder, there were transferred from the employ of the nonincorporate agency [now designated: Canal Zone Government] to the employ of the respondent Panama Canal Company a total of approximately 10,150 employees, including those of the 17 petitioners here who were on the rolls of the nonincorporate agency as of June 30, 1951. (Finding 4, R. 62). By virtue of this transfer the positions that petitioners occupy as officers, operators and members of crews were brought within the category of vessel employees of the Company. There was no provision in the 1950 Act or Executive Order that served to give these transferees a special status different from that of the employees the Company already had; therefore, they became subject to the existing laws regulating the affairs of the corporation and, more specifically, to the terms of Sections 102(d) and 606.

In the light of these circumstances it is plain that the opinion of the Court of Appeals is not in conflict with the *Townsley* decision of this Court, the only one relied upon by petitioners to show such conflict.

3. *The decision below is clearly correct.*—The Court of Appeals held (i) that petitioners are vessel employees within the meaning of Sections 102(d) and 606, (ii) that assuming, without deciding, that travel time is hours of labor under the Thomas Amendment) there is a repugnancy between Section 606 and the Thomas Amendment, and (iii) that Section 606 is a specific statute that must take precedence over the Thomas Amendment. Treating these points in order, it is to be noted first that there is no dispute as to the fact that petitioners are officers, operators or members of the crews of dredges and other vessels operated by the respondent on navigable waters of the Canal Zone (R. 36, 61-65).

[11] 3 CFR, 1949-53 Compilation, p. 764

The District Court considered that, as a factual matter, they are vessel employees, but concluded that they are not vessel employees covered by Sections 102(d) and 606. The reason stated by the trial court was that in 1945, when these two sections were enacted, petitioners were not employed by the corporation and so the "Congress in passing specific legislation for 'vessel employees' of the Company could not have had them in mind". (R. 48). The Court of Appeals disagreed because it was of the opinion that Congress could not have intended the wage treatment for the agency's vessel employees *inter se* to be different depending upon whether the Company's employment of them antedated or postdated enactment of Section 606 (Pet. 47). This accords with the principle that a statute that is prospective in operation will apply to persons, subjects, and businesses within its purview and scope, although coming into existence after its passage, where the language fairly includes them. *Cain* v. *Bowlby*, 114 F. 2d 519, 522 (10th Cir. 1940), *cert. denied*, 311 U.S. 710 (1940); *De Lima* v. *Bidwell*, 182 U.S. 1, 197 (1901); *Gaiser* v. *Buck*, 203 Ind. 9, 179 N.E. 4 (1932).

The appellate court noted the anomaly that would result if the Company were required to apply different wage-fixing rules among its vessel employees, dependent upon whether the particular workman had been hired before or after the passage of Section 606.[14] As has already been noted,

[14] The petition calls attention to the fact that the name of the corporation referred to in Section 606, when enacted in 1945, was the "Panama Railroad Company". It argues that petitioners have never worked for an agency with that name and states that the respondent did not attain its corporate existence until 1950.

The correct version of the matter was stipulated by the parties and adopted in the findings of the District Court (R. 61). This shows that the Company, although wholly owned by the United States from 1905, continued under its New York charter until 1948, at which time it was re-incorporated under federal law under the same name. 2 C.Z.C. §§ 245-58 (1934), as added by Act of June 29, 1948, 62 Stat. 1076, effective July 1, 1951, upon transfer to the respondent of the responsibility

the committee reports on this legislation suggested no limitation whatsoever on the authority to apply wage practices vested in the agency by the clear language of the statute.

Assuming *arguendo* that the claimed travel pay would be due petitioners under the Thomas Amendment, the Court of Appeals correctly (and necessarily) found that there was a conflict between such a result and the maritime practice—shown to be that of treating such travel as noncompensable. This conflict demonstrated the repugnancy between the Thomas Amendment and Section 606. (Pet. 16)

Petitioners' easy answer for resolving the incompatibility between the two statutes is: Give us the greater benefit provided by either one; therefore, if travel pay is not a maritime wage practice, the 40-hour workweek standard of the Thomas Amendment should be construed to require that such compensation be paid to us. Such a position ignores the plain direction of the Congress to the effect that maritime industry wage practices are to be applied in federal employment to the precise worker category of which petitioners are undeniably a part.

The Court of Appeals, having found no means of harmonizing the two enactments so as to give effect to both, ruled that the specific terms of Section 606 control. The decision was correct under the well-settled principle

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for operation of the Panama Canal, the respondent's name became "Panama Canal Company", pursuant to Section 2(a)(2) of the Act of September 26, 1950, 64 Stat. 1041. The said section provided that the term "the Panama Railroad Company", wherever appearing in the statutes of the United States and having reference, prospectively, to the corporation thereafter known by that name, was amended to read "the Panama Canal Company".

Sections 102(d) and 606, as amended, clearly cover the vessel employees of the Panama Canal Company and the scope of the corporate powers contained in Section 249 of Title 2, Canal Zone Code (1934) (*Supra*, p. 5), shows that respondent's vessel employees were not expected to be limited to a single category or type of vessel.

of statutory construction that specific terms covering a given subject matter will prevail over the general language of the same or another statute which might otherwise prove controlling. *Baltimore National Bank* v. *State Tax Com'r*, 297 U.S. 209 (1936); *Bulova Watch Co.* v. *United States*, 365 U.S. 753 (1961). Clearly the Thomas Amendment is general in nature, covering employees in various trades and occupations in many unrelated industries. On the other hand, the term "vessel employees" identifies a distinct group in a particular industry which, in pay and labor legislation, has almost invariably been treated separately from groups in other industries.

On this point petitioners argue variously that the Thomas Amendment is more specific than Section 606, or that giving effect to the latter statute would constitute an implied repeal of the first. Here the employees rely in part upon *Sinclair Refining Co.* v. *Atkinson*, 370 U.S. 195 (1962). That case held that the general provision of the Taft-Hartley Act providing for suits between employers and employees arising out of labor contracts did not repeal an earlier specific prohibition against injunctions contained in the Norris-LaGuardia Act. The result obtaining there is fully consistent with the respondent's position here, namely, in affirming the controlling effect to be given a specific statute over a law of a general nature even where such general statute is enacted later. In the instant case, of course, the specific statute, Section 606, was passed after enactment of the general law.

The result reached was also proper because it carries out the express intention of the Congress. There is no doubt that the policy of the laws was, and is, to give maritime workers in the four Government agencies named (including the Panama Canal Company) the same compensation, both basic and premium, that they would receive in comparable jobs in private industry. This is confirmed by the fact that in 1949, after Section 606 had

been in effect for more than four years, Congress extended the plan to officers and members of crews of vessels throughout the federal service.[15] As this Court said in *Atkinson*: "Where congressional intent is discernible—and here it seems crystal clear—we must give effect to that intent." 370 U.S., at 215.

4. *Petitioners' reliance upon 2 C.Z. Code § 248 (1934) is without substance and, in any event, presents an issue not raised in the court below.*—The third question presented by the petition is phrased in terms of a query whether the Court of Appeals should have remanded the case to the District Court to determine whether the employees are entitled to the claimed compensation for travel time under Section 248[16] of Title 2, Canal Zone Code, as a matter of right arising independently without regard to the Thomas Amendment. In essence, the question actually is:

> Whether petitioners have a statutory right to the travel time sought by them under Section 248 of Title 2 Canal Zone Code (1934), which simply, in effect, authorizes the respondent to appoint its employees, define their authority and duties, and fix their compensation.

The foregoing raises a purely legal issue which could be decided without the necessity of a remand if the case were accepted by this Court for review. However, respondent contends that the asserted right is so completely devoid of both substance and merit that further consideration of it would be unwarranted. Section 248(e) contains the statement of one of the general powers bestowed upon the corporation; it is the power relating to employees and their compensation. It provides that the Panama Canal Company may

[15] Classification Act of 1949, § 202(8), 63 Stat. 955, 5 U.S.C. § 1082(8).

[16] As added by Act of June 29, 1948, c. 707, § 2, 62 Stat. 1076, and amended September 26, 1950, c. 1049, § 8, 64 Stat. 1041. The pertinent portions of § 248 are set out in this brief at p. 5.

> "appoint such officers, agents, attorneys, and employees as may be necessary for the conduct of the business of the corporation, define their authority and duties, fix their compensation, delegate to them such of the powers of the corporation as may be necessary, require that such of them as it may designate be bonded, and fix the penalties and pay the premiums of such bonds."

This subsection vests full authority in the corporation to appoint employees such as the petitioners, to assign them to duty, and to fix their compensation.

There is nothing in such a grant of authority that prescribes the manner in which the discretion should be exercised; it vests no affirmative rights in the employees appointed thereunder and so provides not the slightest support for the petitioners' travel-time claim. On the contrary, the exercise of this general corporate power by respondent is wholly consistent with the concomitant use of Section 606 in fixing the compensation of petitioners and other vessel employees of the Company.

If the question *were* one of possible merit, it should still not be reviewed on certiorari because it was not timely urged below. Although Section 248 was pleaded in the complaints (R. 5, 8), the District Judge did not find in it any support for petitioners' claim (R. 54, 57). It was the application of the Thomas Amendment, and not Section 248, that was the basis of the trial court's ruling in favor of petitioners. In discussing the point, petitioners do not suggest how the alleged entitlement to travel-time pay could arise from Section 248. They merely state that the question was not certified to the Court of Appeals under 28 U.S.C. § 1292(b) as were the questions involving the Thomas Amendment. That deficiency was of their own making, because on June 14, 1961, when respondent's motion for certification of two questions was heard, the court expressed a desire to certify all controlling questions

of law in the case and gave the parties until June 23, 1961 to submit them (R. 97). None was offered or certified on behalf of petitioners.

In their brief in the Court of Appeals, petitioners cited Section 248 only for the limited purpose of arguing that they must be regarded as employees of the United States and, as such, subject to the provisions of the Thomas Amendment. (Brief for Appellees, p. 28)

It was not until after judgment had been entered in the appellate court that petitioners advanced the idea of an independent statutory right to travel pay arising out of Section 248. In asking the Court of Appeals to rehear the case *en banc*,[1] the petitioners asserted that it had "erroneously failed to remand the case for further consideration of the validity of appellees' claims under Section 248 of Title 2, Canal Zone Code, as amended, to which the District Court had held appellees subject." As they have done here, petitioners refrained from stating why they felt there was such a statutory right to travel-time pay independent of the Thomas Amendment. The argument was limited to a suggestion that there should be further consideration of the matter in the trial court (Appellee's Petition for Rehearing and Brief in Support of Petition, pp. 2-10).

In view of the fact that this point was not timely raised and briefed in the court below and was not considered there, it should not be reviewed here. *California* v. *Taylor*, 353 U.S. 553, 557, n. 2 (1957); *Lawn* v. *United States*, 355 U.S. 339, 362, n. 16 (1958); *Ellis* v. *Dixon*, 349 U.S. 458, 460 (1955).

3. *The decision is sustainable on other grounds urged by respondent in the court below.*—Respondent submits that the result reached by the Court of Appeals would have

[1] Rule 25a, U.S. Court of Appeals for the Fifth Circuit, 28 U.S.C.A. (Supp. 1962, p. 57).

been the same even if the Thomas Amendment had been found to be applicable. If the writ of certiorari were granted, the Panama Canal Company would be prepared to show that the time spent by petitioners in travel to and from work does not constitute *hours of labor* for which compensation must be paid. It has been noted that the District Court held the portion of the employees' travel performed overland *is not work*, whereas the remainder of the journey over water *is working time*. Respondent contends that, absent an abuse of administrative discretion which cannot be shown here, such determinations lie within the area of agency management and personnel [18] and are matters entrusted to the discretion of the executive branch rather than to the judiciary. The courts have consistently refrained from invading territory that is inherently legislative or executive. *Field* v. *Giegengack*, 73 F. 2d 945, 947 (D.C. Cir. 1934).[19]

It is readily demonstrable that the Company's determination regarding nonremunerability of travel time is supported by substantial evidence and would be upheld upon review. Assuming *arguendo* that the petitioners are entitled to full judicial review, travel time spent upon waterborne conveyances does not constitute hours of labor within the meaning of the Thomas Amendment under the stated facts found by the District Court. The only decided cases that appear to have treated the question of travel over water hold that, under both Section 201 of the Federal Employees Pay Act of 1945 and the Fair Labor Standards Act, such time is *not compensable*. *Alhearn* v. *United States*, 142 Ct. Cl. 309 (1958); *Bulot* v. *Freeport Sulphur Co.*, 45 F.

[18] Section 4 of the Administrative Procedure Act expressly excludes from rule-making those matters relating to "agency management or personnel," and Section 10 of the Act provides that there shall be no review of action that "is by law committed to agency discretion." 60 Stat. 238, 243 (1946), 5 U.S.C. §§ 1003, 1009.

[19] See also *Panama Canal Company* v. *Grace Line, Inc.*, 356 U.S. 309, 318 (1958).

Supp. 380 (E.D. La. 1942); *West* v. *Texas Co.*, 65 F. Supp. 97 (E.D. La., 1946).

Respondent would also be prepared to show that the decision below is correct because the Thomas Amendment does not apply to the petitioners irrespective of the effect of Section 606. This follows from the fact that petitioners are paid on an hourly basis. The Thomas Amendment was extended for the first time to Government corporations by Section 205 of the Federal Employees Pay Act of 1945, but such extension was limited to per annum and monthly employees. Since prior to 1945 the Amendment did not cover any workers of corporate agencies, after the enactment of Section 205 the hourly employees such as petitioners remained outside the coverage of the 1934 enactment.

Finally with respect to the 133 petitioners whose positions have been designated as *local-rate* because the compensation has been based upon local prevailing pay rates, it would be shown that none of this group is classifiable as a wage-board employee and, therefore, none of them is subject to the Thomas Amendment. This conclusion is based upon the well-defined pattern of Federal statutes which uniformly treat them as separate from the wage-board groups whose compensation is fixed on the basis of prevailing rates in the continental United States, and as therefore outside the scope of the Thomas Amendment. It is also confirmed by long-standing administrative construction of the law by the Comptroller General of the United States and the Panama Canal agencies concerned.

It is submitted that the decision of the Court of Appeals can be readily supported on the alternative grounds which were acknowledged by the court but which it was not required to decide (Pet. 17).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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JUNE 1963.